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October 13, 1998

By Hand

Ms. Magalie Salas, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, NW, Room 239
Washington, D.C. 20554

Re: Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120

Dear Ms. Salas:

Please find enclosed for filing an original and nine copies of Time Warner Cable's Comments.

Also enclosed is one extra copy; please date-stamp and return this copy in the self-addressed envelope provided.

Very truly yours,

Henk Brands

Enc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Carriage of the	)	
Transmissions of Digital	)	
Television Broadcast	)	CS Docket No. 98-120
Stations	)	
	)	
Amendments to Part 76 of	)	
the Commission's Rules	)	

COMMENTS OF
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Summary

As explained in these comments, the Constitution does not permit, and the Communications Act does not authorize, the Commission to require cable operators to carry digital signals during the "transition period" between the beginning of digital broadcasting and the end of analog broadcasting. But even if the Commission had such power, it should not exercise it now: requiring cable operators to carry digital signals during the transition period would not be in the public interest.

Because it is still unclear how broadcasters intend to use their digital spectrum, the Commission could not at this time articulate a coherent policy rationale for a digital must-carry requirement. And such a requirement clearly is unnecessary either to preserve free over-the-air television or to hasten the transition to digital television. Moreover, the few consumers that would benefit from such a requirement (cable subscribers owning digital TV sets) could just as easily receive digital broadcast signals off-air.

At the same time, a digital must-carry requirement would cause the vast majority of consumers massive injury. Because cable systems continue to be "channel-locked," consumers would see desirable cable programming replaced with blank screens (or, for those who purchase a converter, duplicative broadcast programming). Moreover, a digital must-carry requirement would make it more difficult for cable operators to offer cable-modem and other innovative new services, and would more generally

inhibit investment in system upgrades -- thus depriving consumers of new products and improved service.

In any event, the First Amendment prohibits the Commission to require cable operators to carry digital signals during the transition period. First, any such requirement must be narrowly tailored to an important governmental interest. At this early time, the Commission could not articulate such an interest. Indeed, the NPRM has not formulated any governmental interest to justify any such rules, thereby depriving cable operators of legally required notice.

Second, the rationale espoused in the Turner case clearly cannot provide a justification. The viability of free over-the-air television broadcasting has already been secured by analog must-carry rules, and it cannot plausibly be argued that carriage of digital signals is necessary to broadcasters' economic survival. In any event, the crushing burden of a doubled must-carry load would render any digital must-carry requirement vastly overbroad.

Finally, hastening the transition to digital television is simply not an "important" governmental interest for purposes of First Amendment analysis. Moreover, in light of the availability of digital signals on cable and elsewhere, a digital must-carry requirement is clearly not necessary to further any such interest.

Imposing a digital must-carry requirement would also work an unauthorized, uncompensated taking, in violation of the Fifth

Amendment. Such a requirement would effect a physical taking just as surely as an invasion by more tangible matter. A federal agency may not effect such a taking unless Congress has expressly authorized it to do so.

Congress has not done so: the Communications Act confers no authority on the Commission to require the carriage of digital signals during the transition period. First, Section 614(b)(4)(B), by its terms and as confirmed in the legislative history of the 1992 Cable Act, allows the Commission to impose a carriage requirement only for broadcast signals "that have been changed" from analog to digital. Because broadcasters will continue transmitting analog signals that have not been changed to digital during the transition, the Commission may not compel carriage of digital signals until broadcasters transmit only digital signals.

Second, Congress's findings in the 1992 Cable Act provide no support for requiring simultaneous carriage of analog and digital signals during the transition. For example, requiring carriage of digital signals would do nothing to further the goal of preserving free over-the-air television service for non-cable subscribers, who will continue to receive analog signals and are unlikely to purchase digital TV sets soon in any event. Moreover, no new communities would receive service as a result of digital broadcasts.

Third, Section 624(f)(1) prohibits the Commission to impose any requirements "regarding the provision or content of cable

services" beyond those expressly provided in the Act. Coupled with the Commission's own recognition in 1993 of its "minimal discretion" over analog must-carry implementation, Section 624(f)(1) cannot be reconciled with any "broad authority" to require carriage of digital signals during the transition period.

Fourth, both the 1996 Telecommunications Act and the 1997 Balanced Budget Act confirm Congress's intent to prohibit the imposition of digital must-carry rules during the transition period. Congress in the 1996 Telecommunications Act nowhere granted the Commission authority to impose any digital must-carry requirement. Similarly, in the portions of the 1997 Balanced Budget Act addressing a host of digital-television issues, Congress inserted no language altering the jurisdictional restrictions of Section 614(b)(4)(B). If anything, the language and legislative history of these two Acts illustrate Congress's intent to affirm the jurisdictional limitation of Section 614(b)(4)(B).

Even if the Commission could somehow surmount the jurisdictional hurdles to mandatory carriage of digital signals, it clearly must construct any digital must-carry regime within the confines of existing statutory parameters. Applying those parameters, it is clear that broadcasters would very rarely be eligible for must-carry of their digital signals during the transition. In particular, under Section 614(b)(3)(A), only a broadcaster's analog signal (which will be the broadcaster's

"primary video" signal during the transition), will be entitled to carriage.

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COMMENTS OF
TIME WARNER CABLE

Time Warner Cable ("TWC"), a division of Time Warner Entertainment Company, L.P., by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.[1] TWC operates cable television systems serving various communities nationwide. TWC's ability to offer its subscribers an optimal mix of services would be substantially impaired by any requirement to carry digital broadcast television signals before analog signals cease broadcasting and the transition to digital television has been completed. Accordingly, TWC is vitally interested in the issues raised in this proceeding.

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[1] Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) ("NPRM").

Introduction

In the NPRM, the Commission suggests that it has broad statutory authority to require cable operators to carry digital signals during the "transition period" between the beginning of digital broadcasting (in 1998) and the end of analog broadcasting (which will not occur until December 31, 2006, at the earliest). The NPRM proposes seven alternative must-carry regimes, all but one of which would result in some degree of mandatory carriage by cable operators of digital signals during the transition period. See NPRM ¶¶ 39-51.

Requiring cable operators to carry digital signals during the transition period would not serve the public interest. Because broadcasters have yet to announce how they intend to use their digital spectrum, it is currently unclear if any consumers would benefit from such a requirement. But it is clear that the vast majority of consumers would end up losing. Because digital signals cannot be received by consumers that have not purchased an expensive digital TV set or converter, consumers would "gain" only infuriating blank screens in their cable line-up. At the same time, consumers would lose popular cable programming that cable operators would have to drop to make room for digital signals.

Moreover, it would be unlawful for the Commission to require cable operators to carry digital signals during the transition period. By interfering with the editorial discretion of cable operators, such requirements would violate their First Amendment

rights. At the same time, such requirements would effect an unauthorized and uncompensated taking of cable operators' property in violation of the Fifth Amendment. And the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. (the "Act"), clearly indicates that Congress did not intend a broadcaster's digital signal to have must-carry rights, if at all, until after the broadcaster completes the transition to digital broadcasting by surrendering its analog spectrum.

In any event, the Commission must abide by existing statutory limitations if and when it ever requires cable operators to carry digital signals. Applying those limitations, digital signals will not be entitled to carriage during the transition period. In particular, broadcasters are entitled to carriage of only their "primary video" signal. Thus, broadcasters are not entitled to carriage of both analog and digital signals.

Argument

I. REQUIRING CABLE OPERATORS TO CARRY DIGITAL SIGNALS DURING THE TRANSITION PERIOD WOULD NOT SERVE THE PUBLIC INTEREST.

As explained in later parts of these comments, the Communications Act does not authorize, and the Constitution does not permit, the Commission to require cable operators to carry digital signals during the transition period. But it is not necessary for the Commission to reach questions of statutory power and constitutional limits at this time. In exercising any power, the Commission "should begin with the old adage: Do no

harm."[2] Regulatory intervention would do harm: requiring cable operators to carry digital signals during the transition period would diminish consumer welfare. Thus, even assuming it has any power to act, the Commission should not, as a matter of policy, exercise that power now. Instead, it should allow carriage issues to be resolved in the marketplace.

A. Requiring Cable Operators To Carry Digital Signals During the Transition Period Would Not Benefit Consumers.

Under this Commission's rules, broadcasters are largely free to determine their use of digital spectrum: they may broadcast in high-definition or standard-definition format, they may provide free or pay services, and they may transmit video, audio, data, or any mix thereof.[3] To date, few broadcasters have announced just how they intend to use their digital spectrum, and even the plans of those that have may still change depending on competitive developments. If there is any certainty at this time, then, it is this: "nobody has the answer to the who, what, where, when, and how of digital TV."[4]

In light of this unsettled state of affairs, it would be impossible for the Commission to articulate a coherent policy

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[2] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, 11,634 (1998) (separate statement of Comm'r Furchtgott-Roth).

[3] See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12,809, ¶¶ 29, 41 (1997) ("Fifth Report and Order").

[4] Remarks of William E. Kennard Before the Int'l Radio & Television Soc'y, New York, N.Y., Sept. 15, 1998; see also Fifth Report and Order ¶ 42.

rationale for a requirement that cable operators carry digital signals during the transition period: imposition of such a requirement would simply be a stab in the dark. Indeed, the Commission implicitly acknowledges as much: instead of itself formulating a rationale for mandatory carriage in the NPRM, the Commission invites commenters to do so for it. See NPRM ¶ 16.

But no coherent policy rationale exists. In particular, the traditional rationale for must-carry requirements does not apply to digital signals. Must-carry requirements for analog signals have been premised on the assumption that cable operators might drop broadcasters' signals (thus diluting such broadcasters' audience and advertising support), and that the eventual economic demise of such broadcasters might deprive consumers who do not subscribe to cable of the benefits associated with those broadcasters' programming.[5] That rationale cannot apply to carriage of digital signals during the transition period. Cable operators will continue to carry analog signals through the transition. Thus, broadcasters' advertising support is guaranteed.

Nor can it plausibly be argued that requiring cable operators to carry digital signals during the transition period is necessary to hasten the transition to digital television.[6]

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[5] See generally Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 646 (1994) ("Turner I").

[6] The theory would presumably be that, without digital must-carry rules, cable subscribers would have no access to digital signals and would therefore have insufficient incentive to purchase digital TV sets.

Cable operators -- on their own steam -- are in the midst of a massive effort to make the digital revolution a reality.[7] For example, TWC in 1996 launched a five-year, $4 billion program to expand the spectrum available on its cable systems to 750 MHz. TWC anticipates that as much as 200 MHz of the capacity of each upgraded system will be devoted to digital applications. Depending on consumer demand, these applications will undoubtedly include HDTV. For example, TWC will soon be able to provide HDTV signals of cable programming services like MSG, HBO, and Discovery. See Chiddix Aff. ¶¶ 3, 4 (attached to these comments as Exhibit A).

Market forces will thus ensure digital signals' availability: eager to sign up each other's wealthiest and most sophisticated subscribers, cable operators and DBS services will compete to provide digital signals if consumers demand them. See id. ¶ 5. And, marketing studies by CEMA indicate that the sale of digital TV sets will initially be driven by movies in HDTV format. See Communications Daily, Aug. 5, 1998, at 8. If that is so, HDTV signals of services like HBO will at least as much to drive the sale of digital TV sets as carriage of broadcast

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[7] In contrast, broadcasters have received a massive federal subsidy to this end. The Congressional Budget Office has conservatively estimated that auctioning the spectrum broadcasters currently use to transmit analog signals could net more than $5.4 billion when it is returned. See Broadcasters Fighting Fees and "Trigger Tax" in Clinton Budget Proposal, Communications Daily, May 1, 1997. Surely, the value of the digital spectrum broadcasters have received is worth at least this amount.

signals (which may not even be in HDTV format in the first place).[8]

In sum, requiring cable operators to carry digital signals during the transition period would serve no substantial policy objectives. In all likelihood, then, immediate imposition of digital must-carry rules would benefit only a small subset of the wealthiest consumers: those who are able to afford a digital TV set and subscribe to cable (not DBS). Even in the most optimistic forecasts, it is expected that this category of consumers will be small for the foreseeable future: few people will purchase digital TV sets until prices fall significantly, which may still be years away.[9] By requiring cable operators to carry digital signals, the Commission would initially benefit these consumers -- and only these consumers.

And, even for these consumers, the benefit would be insignificant: even if cable operators would not carry some digital broadcast signals voluntarily, those signals would be readily accessible off-air. Digital TV sets have electronic, remote-controlled, input-selection switches built in. See generally Large Aff. (attached to these comments as Exhibit B).

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[8]And certainly no one could argue that consumers will refrain from purchasing digital TV sets unless every local digital broadcast signal is carried on cable.

[9]See, e.g., J. Brinkley, High Definition, High in Price, N.Y. Times, Aug. 20, 1998, at G-1 ("no one expects the bulk of the population will embrace digital television until prices for the sets fall by 90 percent or more"). Indeed, manufacturers expect to make no more than 100,000 digital TV sets this year. See id. By contrast, more than 25 million analog sets are sold each year. See id.

Just as DBS subscribers have done for years, see id. ¶¶ 36-38,[10] owners of digital TV sets will therefore find it easy and convenient to use an antenna to receive off-air signals, see id. ¶ 40.[11] Purchasers of digital TV sets will have an even stronger incentive to do so: given the enormous cost of such sets, they will obviously want to put them to good use by accessing as many digital signals as possible.

B. Requiring Cable Operators To Carry Digital Signals During the Transition Period Would Cause Consumers Massive Harm.

Whereas it is thus uncertain, to say the least, whether any consumers would benefit in an appreciable way from digital must-carry requirements, it is certain that the vast majority of consumers would be seriously hurt. Most cable subscribers will initially not possess digital TV sets or even converters allowing them to display digital signals on an analog TV set. Thus, if cable operators were required to carry digital broadcast signals, much of such consumers' cable line-up would consist simply of infuriating blank screens. And, even if such consumers would purchase expensive converters, they would gain access only to largely duplicative broadcast programming.

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[10] See also Exhibit C attached to these comments (USSB materials extolling the convenience of using, alongside a DBS receiver, an antenna to receive off-air broadcast signals).

[11] See also Monica Hogan, CEMA Readies Antenna Maps for Dealers, Multichannel News, Aug. 10, 1998, at 32 (illustrating consumer electronics manufacturers' plans to facilitate reception of digital broadcast signals) (attached to these comments as Exhibit D).

At the same time, consumers would lose access to vast numbers of cable programming services. TWC's systems (like those of most other cable operators) continue to lack appreciable numbers of vacant channels. See Leddy Aff. ¶¶ 4, 8 (attached to these comments as Exhibit E). Thus, TWC on average might be forced to drop 10 or more non-broadcast signals per system. See id. ¶¶ 6, 8.[12] And, unlike broadcasters, cable programming services have no alternate, government-subsidized, distribution outlet: being dropped from cable usually means losing access to consumers. It would truly be ironic if consumers were to see such cable programming services replaced by broadcast signals that they can already access on cable in analog format and off-air in analog and digital format.

Being required to carry digital broadcast signals during the transition period would also hamstring cable operators in providing innovative new services, such as cable-modem service. This Commission's members have consistently sought to encourage cable operators to compete with common carriers in providing data and voice telecommunications services.[13] Requiring cable

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[12] See also NPRM ¶ 41 ("significant cable channel line-up disruptions may occur as cable operators, whose systems are channel-locked, would have to drop existing cable programming services to accommodate the carriage of digital television signals").

[13] See, e.g., Statement of William E. Kennard, Chairman, FCC, Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 1998 FCC LEXIS 2760, at *14 (June 10, 1998) (lauding competition provided by cable-modem service); Remarks by William E. Kennard, Chairman, FCC, to National Cable Television Association, 1998 FCC LEXIS 2149, at *4-*5 (May 5, 1998) (same); Remarks by Michael K. Powell, Comm'r,

operators to set aside scarce digital cable spectrum for duplicative broadcast signals would leave less spectrum available for innovative services, thereby fatally subverting the Commission's policy objectives.

More generally, requiring cable operators to carry digital signals during the transition period would have a devastating impact on cable operators' incentives to upgrade their systems. In the future, cable operators would no doubt think twice before parting with capital if they knew that any spectrum additions would have to be reserved for use as a distribution outlet for a favored set of programmers. In the end, the consumer would of course end up the loser: efficient investment simply would not occur, depriving consumers of new products and better service.

In sum, there are no good reasons to believe that requiring cable operators to carry digital signals during the transition period would make consumers better off, and there <u>are</u> good reasons to believe that such a requirement would make consumers worse off. Thus, the Commission should not impose such a requirement. At a minimum, the Commission should stay its hand until it becomes clear how broadcasters will use their digital spectrum. Until that time, there can be no coherent policy rationale for imposing any digital must-carry requirements. And there is no reason to believe that, in the meantime, issues relating to carriage of digital signals cannot be resolved in

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FCC, Before the National Cable Television Association (May 5, 1998) (same) (http://www.fcc.gov/Speeches/Powell/spmkp811.html).

private negotiations between cable operators and broadcasters. Thus, in the words of Chairman Kennard, the Commission for now "must trust in the marketplace."[14]

II. REQUIRING CABLE OPERATORS TO CARRY DIGITAL SIGNALS DURING THE TRANSITION PERIOD WOULD VIOLATE THE FIRST AMENDMENT.

Quite apart from being unwise, it would also be unlawful to require cable operators to carry digital signals during the transition period: the Commission cannot impose such a requirement without violating the First Amendment. Until it is clear how broadcasters intend to use their digital spectrum, it is impossible to identify any governmental interest that would be served by requiring carriage. And the Commission cannot credibly rely on any interests in preserving free over-the-air television or in hastening the introduction of digital television. Regardless, requiring cable operators to carry digital signals during the transition period would impose a massive burden and would therefore be immeasurably overbroad.

A. The Commission Does Not and Cannot Identify Any Important Governmental Interest That Would Justify Requiring Cable Operators To Carry Digital Signals During the Transition Period.

Although the FCC lacks power to declare an Act of Congress unconstitutional, see, e.g., Johnson v. Robison, 415 U.S. 361, 368 (1974), it must consider the constitutionality of rules not statutorily compelled, see, e.g., American Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 766 n.6 (D.C. Cir.

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[14]Remarks of William E. Kennard Before the Int'l Radio & Television Soc'y, New York, N.Y., Sept. 15, 1998.

1997); Meredith Corp. v. FCC, 809 F.2d 863, 872-73 & n.11 (D.C. Cir. 1987). The NPRM correctly does not take the position that the 1992 Cable Act requires the Commission to give must-carry rights to digital broadcast signals during the transition period. Thus, the Commission must navigate by reference to a constitutional compass.

Indeed, the Commission must do more than simply avoid rules of certain unconstitutionality: it must avoid adopting even rules whose constitutional validity is merely in doubt. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) ("statute is to be construed where fairly possible so as to avoid substantial constitutional questions"). And it must do so each time it faces a decision in this rulemaking: at every step, it must weigh constitutional considerations, tailor its choices narrowly, and thereby avoid even arguably unconstitutional results.

It is by now axiomatic that cable operators and cable programming services engage in constitutionally protected speech. See, e.g., Leathers v. Medlock, 499 U.S. 439, 444 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). Must-carry requirements burden that speech by interfering with cable operators' editorial discretion and by rendering it more difficult for cable programmers to obtain carriage. See, e.g., Turner I, 512 U.S. at 636-37, 643-45.

It is equally settled that "content based" must-carry requirements are subject to "the most exacting [First Amendment]

scrutiny." Id. at 642. Must-carry requirements are "content based" if, for example, their "purpose is to regulate speech because of the message it conveys," id. at 645, or if they "grant access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators," id. at 655. Such content-based must-carry requirements must be shown to be "narrowly tailored to a compelling state interest." Id. at 680 (O'Connor, J., concurring in part and dissenting in part).

Content-neutral must-carry requirements are still subject to the "intermediate" First Amendment scrutiny of United States v. O'Brien, 391 U.S. 367, 377 (1968). See Turner I, 512 U.S. at 661-62; Turner Broadcasting Sys., Inc. v. FCC, 117 S. Ct. 1174, 1186 (1997) ("Turner II"). A must-carry requirement can satisfy such scrutiny only if "it furthers an important or substantial governmental interest" and does not "burden substantially more speech than is necessary to further the government's . . . interests." Turner I, 512 U.S. at 662; see Turner II, 117 S. Ct. at 1186.

Congress never proposed requiring cable operators to carry digital signals during the transition period. Thus, there are no congressional statements of purpose concerning the governmental interests such a requirement might serve. One would therefore expect that, in proposing a digital must-carry regime, the Commission would feel compelled to identify with some specificity what purposes it believes such a regime might serve. But the

Commission has not done this; instead, the NPRM asks commenters to do so for it. See NPRM ¶ 16 (asking commenters "to build a record relating to the interests to be served by any digital broadcast signal carriage rules").

That the Commission should propose must-carry requirements without identifying the interests such requirements might serve is perhaps not surprising: at this early stage, it is simply impossible to formulate a coherent basis in policy. See supra, Part I. However that may be, the Commission's failure makes it unlikely that any digital must-carry rules could survive judicial review. Until the Commission identifies the interests served, commenters cannot meaningfully analyze even whether must-carry rules would be content-based or otherwise subject to strict scrutiny under the First Amendment. Thus, the Commission has deprived cable operators of a meaningful opportunity to comment.[15]

B. The Rationale Advanced in Turner Cannot Justify Requiring Cable Operators To Carry Digital Signals During the Transition Period.

If the Commission believes that requiring cable operators to carry digital signals during the transition period can be sustained on the rationale advanced in the Turner litigation

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[15] See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.) (per curiam) ("HBO") (Administrative Procedure Act's notice requirement, see 5 U.S.C. § 553(b)(3), demands that agency "make its views known to the public"), cert. denied, 434 U.S. 829, 988 (1977).

(there are some hints to that effect in the NPRM),[16] it is mistaken. The must-carry regime at issue in Turner was supported by elaborate congressional statements of purpose and findings of fact, which were based on hearings conducted over a span of three years and evidence concerning events going back as far as eight years. See Turner I, 512 U.S. at 632-33. Even though the Supreme Court accorded extensive deference to those congressional findings, it still only narrowly sustained must-carry: after a vast record was created on remand, in a five-to-four decision, and without a single majority opinion. See Turner II, 117 S. Ct. 1174 (1997).

If this Commission now promulgates digital must-carry requirements, they will be subject to much more searching review than the statutory requirements at issue in Turner, for the Commission's factual determinations are not entitled to the deference courts accord Congress's. See Turner II, 117 S. Ct. at 1189. Thus, courts will require the Commission to point to "a record that convincingly shows a problem to exist," HBO, 567 F.2d at 50, and will place the burden of proving any prediction "susceptible of empirical proof" squarely on the Commission, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1457-58 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). Where "there is no evidence of any urgent need for preventive action," courts will withhold any "benefit of the doubt." HBO, 567 F.2d at 75.

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[16] See, e.g., NPRM ¶ 1 (pointing to statutory goal of "retention of the strength and competitiveness of broadcast television").

Measured by these standards, the Turner rationale cannot possibly justify any requirement that cable operators carry digital signals during the transition period.

1. In the Turner litigation, the Government defended the must-carry requirements of the 1992 Cable Act by pointing to "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." Turner I, 512 U.S. at 662. In the end, the Court determined, these interests collapsed into a single "overriding objective": to "preserve access to free television programming for the 40 percent of Americans without cable." Id. at 646.

The Supreme Court agreed that, in the abstract, this objective was "important" for purposes of O'Brien analysis. See id. at 662-63. But abstract importance alone was insufficient. See id. at 664-65 (plurality). As Justice Kennedy's lead opinion put it: "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id. at 664 (internal quotation marks and citation omitted).